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THE 2017 ATLANTIC HURRICANE SEASON:

Insurance Coverage for Harvey, Irma, Jose, and Maria

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INTRODUCTION

The 2017 Atlantic hurricane season is already one of the most devastating in history. In late August, Harvey struck at the heart of Houston, Texas, and dropped 51.88 inches of rainfall in Texas, the highest rainfall total to date for any Atlantic tropical cyclone in the United States and the fifth highest rainfall total for a tropical cyclone in the Atlantic basin. Irma followed closely on Harvey's heels in early September. Irma clocked the strongest wind speed of any hurricane to form in the Atlantic in more than a decade, wreaked havoc in the Caribbean, the Florida Keys, and up the Florida peninsula. Storm surge affected many areas in the southeastern United States including Jacksonville, Savannah, and portions of South Carolina. Jose brought tropical storm winds to lower New England and high surf along much of the Atlantic. Maria hammered Puerto Rico, the Caribbean, and headed westward. These storms have already caused loss of life, destruction, and dislocation on a massive scale.

The economic impact of these storms will be felt by businesses and individuals across the country for some time. Obviously, many businesses have suffered direct damage to property and lost income due to the resulting interruption of their operations, but many other businesses have also lost substantial income due to evacuation orders, disruption of utility service, disruption of mass transit on which their employees rely to get to and from work, and disruption of the operations of key suppliers or customers. Early loss estimates have now reached $170 billion, and surely will go higher. As the situation stabilizes and the focus turns to economic recovery, businesses will begin to examine their operations, assess their losses, and look to their insurance for compensation.

There is no doubt that recovering insurance for many of these losses will be as complicated and challenging as has been the case with 9/11, Hurricane Katrina, and Superstorm Sandy. Specifically, property insurance, including business interruption and contingent business interruption coverages, protect against more than just physical damage to and loss of property. Such insurance also often protects financial losses arising from an inability to conduct business (either at all or at the same levels as before); the extra expenses incurred in dealing with the effects of a disaster, including money spent to minimize any damage and losses; and the costs incurred in establishing the extent of the losses. Moreover, contingent business interruption coverage often contained in first-party property policies may provide coverage when a business faces loss due to its suppliers' inability to provide needed parts and resources, or its customers' inability to take delivery of product because of the damage to their own business ventures. Other types of insurance that also may respond include policies for trade disruption, event cancellation, and directors and officers. Specific policy language and particular circumstances may impact the availability and scope of coverage significantly. Indeed, how loss is characterized may affect the applicability and amount of deductibles, sub-limits, and coverage extensions.

A business that faces losses from any major storm event should immediately consider how its insurance will respond, assess its insurance policies, and develop a plan to determine and document losses that were or will be sustained because of the disaster. Experience tells us that even sophisticated businesses unknowingly commit errors in assessing and documenting their losses or interpreting their insurance policies that later limit or even bar potential insurance recovery, and that insurers frequently use initial characterizations or "labels" as a basis to restrict or eliminate coverage.

As a starting point for that assessment, this white paper discusses issues common to most policies, including: whether damage or loss was caused by wind or flood, where damage caused by flood may be excluded; the impact of "Named Windstorm" provisions on the extent of coverage; coverage for loss caused by the disruption of utility services; coverage for loss attributed to lack of ingress or egress to insured facilities, to evacuation orders, or to other orders of civil authorities; and coverage for loss resulting from damage to key suppliers or customers. It is important to note that policy terms vary widely, and there is no substitute for careful policy analysis.

TYPES OF POLICIES THAT MAY APPLY

Insurance for losses caused by disasters such as the 2017 Atlantic hurricanes and related weather events can be provided under several different types of insurance policies. This coverage is not only provided under the ordinary "property" policy. It also may be provided under other policies, such as those providing coverage for "environmental" losses, "maritime" losses, and "warehouse" losses. Thus, it is important for an insured to review all of its policies in order to determine the extent of its coverage. Many property insurance policies cover losses to real property caused by all perils. Some policies cover all causes of loss not expressly excluded. Because of the breadth of coverage afforded by an "all risk" policy, the burden of proof shifts to the insurer to show that the loss is not covered, once the insured demonstrates it has suffered a loss. *See, e.g., Northrop Grumman Corp. v. Factory Mut. Ins. Co.,* 805 F. Supp. 2d 945, 950 (C.D. Cal. 2011) ("It is well settled that an insured under an all risks policy can 'reasonably expect' coverage for all losses that are not clearly excluded or limited.").

By comparison, a second type of property insurance—a "named perils" policy—covers only those perils expressly listed. Both types of policies may contain exclusions for weather conditions. Absent a clear exclusion, coverage may be afforded.

COVERAGE FOR PHYSICAL DAMAGE TO OR DESTRUCTION OF PROPERTY

A. Coverage for Real Property

First-party property policies generally provide insurance for "direct physical loss of or damage to property." Traditional losses under first-party property policies involve tangible property, including buildings, permanently installed machinery or equipment, inventory, and fixtures. They may also involve personal property owned by the insured that is used to service and maintain buildings and premises, such as fire extinguishing equipment. Such insurance generally excludes intangible losses. However, some cases hold that if the property is rendered unusable, such as by the presence of contaminants, a first-party property policy may provide coverage.

An insured must have an "insurable interest" in the property at the time of the covered incident, such as a fire or an earthquake. *See, e.g.,* Fla. Stat. § 627.405. Courts interpret "insurable interest" fairly broadly, and the concept may encompass contingent and beneficial interests. The insured does not have to own or lease the property to have an insurable interest. *See Zurich Am. Ins. Co. v. ABM Indus., Inc.,* 397 F.3d 158, 165-68 (2d Cir. 2005) (an insured, which provided engineering and janitorial services to nearly all of the World Trade Center ("WTC") tenants and also used and/or leased common areas at the WTC, had an "insurable interest" in the areas that it used or occupied). A financial interest in the continued existence of the property will constitute an insurable interest as well. *See Zurich Am. Ins. Co. v. Felipe Grimberg Fine Art,* 2008 U.S. Dist. LEXIS 10544, at *18-19 (S.D.N.Y. Feb. 13, 2008) ("An insurable interest in property depends on whether the person has a title to, lien upon, or possession of the property, and whether 'by the existence of [the property] he will gain an advantage, or by the destruction of which he will suffer a loss.'" (citation omitted)); *Lancellotti v. Md. Cas. Co.,* 260 N.J. Super. 579, 584 (1992) (insured has insurable interest in property if property's loss or destruction results in economic or pecuniary loss).

B. Coverage for Personal Property

Most property insurance policies also insure personal property. This coverage usually is provided under an "unscheduled personal property" provision. This provision typically provides coverage for unscheduled personal property that is "usual or incidental to the occupancy of the premises" or "used by an insured while on the described premises." However, certain types of property that are easily movable usually will be covered only under "floater" policies or "floater" endorsements to the property policy. These policies or endorsements will cover business personal property, including furniture, machinery, and stock, at least to the extent that these items are found within 100 feet of the insured premises.

C. Coverage for Costs Incurred to Prevent Loss

Property policies also typically contain provisions that provide reimbursement for preventative measures taken to avoid loss. Historically, these provisions are known as "sue and labor" provisions (the word "sue" has the now-obsolete meaning of "to go in pursuit of"). Today, such provisions are often referred to as "expenses to prevent loss" provisions. This coverage commonly applies when, for example, an insured boards up its windows to prevent damage. The insured is entitled to reimbursement for these costs regardless of whether the covered property actually suffers damage from a covered peril. *Cf. Royal Indem. Co. v. Grunberg,* 553 N.Y.S.2d 527, 529 (App. Div. 1990) (an insured entitled to coverage under its homeowners policy for expenses incurred to prevent imminent collapse of home because "the policy places an affirmative duty on the insured to maintain and repair all covered property in the event of any loss"); *see also Zurich Ins. Co. v. Pateman,* 692 F. Supp. 371, 375 (D.N.J. 1987) ("Under this provision the underwriter is liable for all costs expended by the insured in preventing or ameliorating a loss which the underwriter would be required to pay.").

The "sue and labor" clause typically is regarded as a distinct type of coverage supplementing a property insurance policy. The clause is designed to protect the insurer's interest by reducing and mitigating the risk of damage from a covered loss. Accordingly, deductibles applicable to other types of coverage provided by the policy should not apply to the "sue and labor" coverage, and the insured should receive full reimbursement from the insurer for these expenses. *See, e.g., Am. Home Assurance Co. v. J. F. Shea Co.,* 445 F. Supp. 365, 369-70 (D.D.C. 1978) (Deductible does not apply to sue and labor coverage because it would be "inconsistent to place an affirmative obligation of this nature on the insureds for the benefit of the insurer and then additionally…require the insureds to pay for the first [portion] of the cost in providing this benefit."); *see also W. & Clay, LLC v. Landmark Am. Ins. Co.,* 2011 WL 321740, at *4 (W.D. Wash. Jan. 28, 2011) (adopting Shea). "Sue and labor" clauses are supplementary to the insurance contract and, as such, amounts paid under this clause will generally not count against an insured's policy limits, barring policy language to the contrary. *See generally M. J. Rudolph Corp. v. Lumber Mut. Fire Ins. Co.,* 371 F. Supp. 1325, 1327 (E.D.N.Y. 1974).

Even absent a "sue and labor" clause in its property policy, an insured may be able to rely on the common law of mitigation of damages or loss to recover costs incurred to avoid insured losses. Courts long have recognized that if an insured takes steps to prevent or minimize damage to covered property, its insurer should pay. *See, e.g., Slay Warehousing Co. v. Reliance Ins. Co.,* 471 F.2d 1364, 1367-68 (8th Cir. 1973) ("[T]he obligation to pay the expenses of protecting the exposed property may arise from either the insurance agreement itself or an implied duty under the policy contract based upon general principles of law and equity." (citations omitted)); *Winkler v. Great Am. Ins. Co.,* 447 F. Supp. 135, 142 (E.D.N.Y. 1978) (If insured had raised his house to avoid flood damage, insurer would have to pay expenses because "the duty to protect the property from further damage implies a responsibility on the insurer's part to pay for the cost of reasonable protective measures."); *see also McNeilab, Inc. v. N. River Ins. Co.,* 645 F. Supp. 525, 551 (D.N.J. 1986) ("[I]n cases where an insured takes steps to minimize the harm already incurred, the insured is lessening an already vested damage recovery right and is, therefore, entitled to reimbursement for its reasonable expenses from its insurer.").

COVERAGE AND EXCLUSIONS FOR PARTICULAR CAUSES OF LOSS

There are many possible causes of loss stemming from hurricanes: wind, wind-driven rain, storm surge, flooding, power outages, orders by civil authority, and looting—just to name a few. In some cases, more than one cause may have contributed to an insured's losses. Indeed, one issue likely to arise relates to the question of whether losses were caused by a "Named Windstorm" or "Named Storm." Many policies have deductibles that specifically apply to "Named Storms" and "Named Windstorms" that are higher than deductibles that apply to other perils or causes of loss. Thus, factual questions may arise. Recently, in a coverage dispute regarding Superstorm Sandy, a New Jersey judge ruled that a $100 million sublimit for flood losses did not apply to New Jersey Transit Corporation's losses despite a surge of water on tracks, bridges, tunnels, and power stations, because the policy's definition of "named windstorm" included coverage for storm surge. *See New Jersey Transit Corp. v. Certain Underwriters at Lloyd's London,* No. ESX-L-006977-14 (N.J. Super.). However, when faced with different factual scenarios, it may benefit insureds to avoid characterizing a storm as a "named storm." In *ARE-East River Science Park, LLC v. Lexington Insurance Co.,* Case No.: No. CV13-01837-BRO (C.D. Ca. 2014), Lexington argued a high deductible for named storms applied to the owner's damage claim because it was caused by "a massive wall of water" Sandy unleashed days earlier. ARE contended, and a jury agreed, that the below-ground parking garage became flooded after Sandy was reclassified from a hurricane to a post-tropical cyclone, precluding the named storm provision from applying.

An insured needs to carefully assess its policies and the precise cause(s) of its particular loss before it characterizes that cause. Different characterizations can have significant impacts on the deductibles and sub-limits of liability. Casually labeling this storm a "hurricane" or a "flood," either internally or externally may be inaccurate in the context of specific losses and negatively impact coverage, particularly because damage may have taken place before or after the storm was designated as a "hurricane" and because "flood" definitions vary.

It is likely that insurers will respond to many hurricane-related coverage claims by arguing that various exclusions bar or limit coverage. Based on the storm and the manner in which insurers have responded to past catastrophic weather-related claims, we expect that insurers will attempt to deny coverage based on "flood" or "water" exclusions. If an insurer invokes such an exclusion, the first step will be to determine whether the exclusion applies to any contributing cause of the insured's loss. If no cause of an insured's loss is excluded, then the need for a causation analysis is moot. If, however, an exclusion applies to a contributing cause of the insured's loss, a causation analysis must be performed to determine the scope of covered loss. While the analysis for determining the cause of loss varies, such a determination frequently involves complex issues of fact.

A. The Scope of the "Flood" Exclusion

Some policies cover the peril of wind but not the peril of flood. Even in those policies that purport to exclude "Flood" losses, the definition of "Flood" may be narrow or unclear. To evaluate a "Flood" exclusion, it is critical to analyze the precise policy language in the context of the policy as a whole. The exclusion may contradict another part of the policy rendering the exclusion ambiguous and inoperable. Notwithstanding, one current commercial property policies excludes "Flood," which the policy defines as follows:

> "Flood" means rising water, surface water, waves, tidal water, tidal wave or tsunami; rising, overflowing or any breach of streams, rivers, lakes, reservoirs, or other bodies of water; or spray from any of the foregoing, all whether driven by wind or not.

See Liberty Mutual Specimen Property Policy (revised April 24, 2009).

In addition to the definition of flood, some policies may contain language regarding "high hazard flood zones," which one policy defines as follows:

> Any Real and Personal property located in a Flood Zone or Special Flood Hazard Area shown on a FHBM or FIRM map and designated as "A, AO, A1-30, AE, A99, AH, AR, V, V1-V30, VE, or VO," by the Federal Emergency Agency ("FEMA") or foreign equivalent.

See Zurich Specimen Property Policy (revised August 2011).

Some primary policies, and umbrella or excess policies, may not include the phrase "whether driven by wind or not." Also, depending on the degree of flood risk faced by the business, it may be possible to purchase coverage for floods as an endorsement to the business' commercial property policy or by purchasing a supplemental policy. *See Park Country Club of Buffalo, Inc. v. Tower Ins. Co. of N.Y.,* 893 N.Y.S.2d 408 (App. Div. 2009). When flood coverage is purchased, it may be subject to a separate deductible and may contain a sub-limit of liability. *See Stewart Enters., Inc. v. RSUI Indem. Co.,* 614 F.3d 117, 120 (5th Cir. 2010) (primary policy providing for sub-limit of $10 million aggregate for flood per policy year).

As discussed above, the burden of proof shifts to the insurer to show that the loss is not covered under an "all risk" policy once an insured shows that it has suffered a loss. To be effective, an insurer's interpretation of its coverage exclusion must be the *only* reasonable one. *See RJC Realty Holding Corp. v. Republic Franklin Ins. Co.,* 2 N.Y.3d 158,165 (2004) (confirming that "an exclusion in an insurance policy can negate coverage only where it is stated 'in clear and unmistakable language [and] is subject to no other reasonable interpretation.'" (quoting *Cont'l Cas. Co. v. Rapid-Am. Corp.,* 80 N.Y.2d 640, 652 (1993))); *Flomerfelt v. Cardiello,* 202 N.J. 432, 442 (2010) ("[E]xclusions are ordinarily strictly construed against the insurer, and if there is more than one possible interpretation of the language, courts apply the meaning that supports coverage rather than the one that limits it." (citations omitted)); *Allstate Ins. Co. v. Barron,* 269 Conn. 394, 406 (2004) ("'[W]hen the words of an insurance contract are, without violence, susceptible of two [equally reasonable] interpretations, that which will sustain the claim and cover the loss must, in preference, be adopted…. [T]his rule of construction favorable to the insured extends to exclusion clauses.'" (quoting *Travelers Ins. Co. v. Namerow,* 261 Conn. 784, 796 (2002))).

Insurers will likely contend that any insured's interpretation suggesting that an insurer intended a "Flood" exclusion to include (i.e., not exclude) wind-driven storm surge is unreasonable. Such arguments may depend upon the precise policy language and, potentially, the underwriting exchanges between them and the insurance broker. Some or all of the following facts may influence those arguments: (1) the "Flood" exclusion may exclude water damage resulting from certain types of water events, such as "surface water" and "sewer backup," but may not exclude "storm surge" or "wind-driven water"; (2) the insurer or insurance broker may have defined flood and wind-driven water as "Named Windstorm," but may not have excluded Named Windstorm from coverage; (3) the insurer or insurance broker may not have included the phrase "whether driven by wind or not" in the policy's flood exclusion, despite using the phrase in another provision within the policy; (4) the insurance broker may have included storm surge in "Named Windstorm" risk analyses in procuring coverage; or (5) the insurer had available to it clear alternative language commonly used in policies to indicate the inclusion of wind-driven storm surge in the definition of flood, but did not use that clearer language in the subject policy.

An insured may possess several arguments that a policy's "Flood" exclusion does not bar water damage resulting from a storm surge. *See, e.g., De Marinis v. Tower Ins. Co. of N.Y.,* 774 N.Y.S.2d 436, 438 (App. Div. 2004) (insurer sought to avoid insured's wind-storm coverage claim by relying on a "Water Damage" exclusion; insurer's summary judgment motion denied because insurer "failed to establish a prima facie case that the policy did not cover the loss claimed."); *see also Platek v. Town of Hamburg,* 948 N.Y.S.2d 797, 798-99 (App. Div. 2012) (water damage exclusion did not exclude coverage when explosion also caused loss); *New Jersey Transit Corp.* No. ESX-L-006977-14 (refusing to apply a "flood" sublimit because the policy's "named storm" definition included "storm surge"). *But see Northrop Grumman Corp. v. Factory Mut. Ins. Co.,* 563 F.3d 777 (9th Cir. 2009) (inundation from the Katrina storm surge fit within definition of "Flood" in excess policy).

Causation determinations and subsequent allocation of hurricane-related losses between covered and uncovered causes will generally involve complex questions of fact and the insurer will frequently bear the burden of proving which portions of the insured's total loss are excluded, if any. *See, e.g., Northrop Grumman Corp. v. Factory Mut. Ins. Co.,* 805 F. Supp. 2d 945, 955 (C.D. Cal. 2011) (once insured submits claim that it "suffered a loss in excess of the Excess Policy's…attachment point…the burden…shifts to [the insurer] to prove which losses are excluded by its Excess Policy."); *PepsiCo, Inc. v. Cont'l Cas. Co.,* 640 F. Supp. 656, 661-62 (S.D.N.Y. 1986) (insurer bears the burden of proving what portion of loss is subject to allocation, if any).

B. Limitations on Flood Exclusions Where Covered Causes Also Contributed to the Insured's Loss

An important issue that may arise in connection with the devastation from hurricanes is whether "Flood" exclusions limit claims for losses that have more than one contributing cause of loss.

Courts in the Gulf Coast region addressed causation issues in the aftermath of *Hurricane Katrina.* In *Vanderbrook v. Unitrin Preferred Ins. Co.* (*In re Katrina Canal Breaches Litigation*) 495 F.3d 191 (5th Cir. 2007), the Fifth Circuit predicted that the Louisiana Supreme Court would find that water damage from Hurricane Katrina was caused only by flood (a cause often excluded from coverage) and that, therefore, no multiple cause analysis was necessary. *Id.* at 221-23. The insureds, however, argued that negligent design, construction, and maintenance of levees, rather than flood, caused the damage. *Id.* at 223. Many courts have shown a willingness to apply a multiple cause analysis to determine whether the damage caused by Hurricane Katrina is covered where the insured argues that another natural cause, such as wind, contributed to or caused its damage in concert with flood. *See, e.g., Leonard v. Nationwide Mut. Ins. Co.,* 499 F.3d 419, 429-31 (5th Cir. 2007); *Tuepker v. State Farm Fire & Cas. Co.,* 507 F.3d 346, 356 (5th Cir. 2007).

While not a weather-related coverage decision, New York's causation test was clearly espoused in a coverage matter that arose in the context of a fire loss and subsequent Department of Buildings Vacate Order. In *Throgs Neck Bagels, Inc. v. GA Insurance Co. of New York,* 671 N.Y.S.2d 66 (App. Div. 1998), the insured bagel shop sought coverage for property damage and the resultant lost business. *Id.* at 67-68. The insurer denied coverage for most of the claim based on a "law or ordinance" exclusion that purported to bar coverage for losses that arose directly or indirectly from the enforcement of a law or ordinance. *Id.* at 68. In determining whether the insured's losses were caused by a covered event, the Appellate Division, First Department explained:

> In determining whether a particular loss was caused by an event covered by an insurance policy where other, noncovered events operate more closely in time or space in producing the loss, the question of whether the covered event was sufficiently proximate to the loss to require that the insurer compensate the insured will depend on whether it was the dominant and efficient cause.

Id. In so explaining, the court held that fire was the efficient cause of all of the losses for which the insured sought coverage. *Id.* at 69. The cost of removing property, the improvements that could not be removed, and the lost business "'necessarily follow[ed]'" from the covered fire. *Id.* (citation omitted).

Applying the efficient proximate cause test, New York courts must not, however, examine or identify "the event that merely set[s] the stage for [a] later event." *Kosich v. Metro. Prop. & Cas. Ins. Co.,* 626 N.Y.S.2d 618, 618 (1995) (internal quotation marks omitted). "Only the most direct and obvious [efficient] cause should be looked to for purposes of the exclusionary clause." *Kula v. State Farm Fire & Cas. Co.,* 628 N.Y.S.2d 988, 991 (1995). "When the court interprets an insurance policy excluding from coverage any injuries 'caused by' a certain class of conditions, the causation inquiry stops at the efficient physical cause of the loss; it does not trace events back to their metaphysical beginnings." *Kimmins Indus. Serv. Corp. v. Reliance Ins. Co.,* 19 F.3d 78, 81 (2d Cir.1994) (internal citations and selected quotation marks omitted).

Applying the standards set forth above, courts addressing causation under New York law in connection with 9/11 coverage claims found in the insureds' favor. *See Ocean Partners v. North River Ins. Co.,* 546 F. Supp. 2d 101, 115 (S.D.N.Y 2008) (rejecting the insurer's assertion that the policy's collapse exclusion barred coverage because the cloud of particulate matter emanating from the towers was the efficient proximate cause of the insured's loss, not the towers' collapse); *Parks Real Estate v. St. Paul Fire & Marine Ins. Co.,* 472 F.3d 33, 48-9 (2d Cir. 2006) (same).

Courts have historically taken differing approaches when addressing coverage in situations where multiple causes may have caused the loss. One of the first decisions to address this issue was *Sabella v. Wisler* 59 Cal. 2d 21 (1963). There, a building contractor had constructed a house and negligently installed a sewer line. Negligent installation was a covered peril under the insurance policy. The sewer line eventually ruptured, causing water to saturate the ground surrounding the insureds' home, resulting in subsidence, an excluded peril. To determine coverage, the California Supreme Court first ascertained the insureds' cause of loss. The court stated the test as follows:

> "[I]n determining whether a loss is within an exception in a policy, where there is a concurrence of different causes, the efficient cause—the one that sets others in motion—is the cause to which the loss is to be attributed, though the other causes may follow it, and operate more immediately in producing the disaster."

Id. at 31 (citation omitted).

In *Gillis v. Sun Insurance Office, Ltd.* 238 Cal. App. 2d 408 (1965), the court applied the efficient proximate cause test to a windstorm. There, the insured, an owner of docking facilities, suffered extensive damage from a windstorm that caused a portion of the facilities to become submerged in the ocean. *Id.* at 410-11. The insured's policy covered loss caused by wind, but excluded loss caused by water or waves. *Id.* at 415. The court, relying on *Sabella,* concluded that wind was the efficient proximate cause of the insured's loss and, therefore, the policy covered its loss. *Id.* at 416-25. Likewise, Massachusetts' highest court applied the efficient proximate cause test and found that a homeowner's policy that included a pollution exclusion provided coverage for damage to oil-contaminated property. *Jussim v. Mass. Bay Ins. Co.,* 415 Mass. 24, 25-31 (1993). The court reasoned that a third party's negligence when pumping oil and not the release of a pollutant was the efficient proximate cause of the damage. *Id.*

Some states follow a "concurrent causation" test, as opposed to an efficient proximate cause test. Under a concurrent causation test, coverage is afforded provided that one of the contributing causes is insured, even if other contributing causes are not insured. Florida, for example, follows the concurrent causation doctrine, as confirmed by the Florida Supreme Court in *Sebo v. American Home Assurance Co.,* 208 So.3d 694 (Fla. 2016). The case involved a homeowner who suffered extensive damage to his home due to leaks during rainstorms. When Sebo reported the water damage to his insurance company, the insurer denied coverage asserting that construction defects were the primary cause of the damage and that the policy expressly excluded damage due to faulty, inadequate, or defective planning. In adopting the concurrent causation test over the efficient proximate cause test, the court reasoned that:

> [T]here is no reasonable way to distinguish the proximate cause of Sebo's property loss—the rain and construction defects acted in concert to create the destruction of Sebo's home. As such, it would not be feasible to apply the EPC doctrine because no efficient cause can be determined.

Sebo, 208 So.3d at 700.

The *Sebo* Court held that the concurrent cause doctrine applies to Sebo's case, rejecting the Second District's concern that "a covered peril can usually be found somewhere in the chain of causation, and to apply the concurrent causation analysis would effectively nullify all exclusions in an all-risk policy." Thus, under Florida law, an insured may recover where two or more perils contribute to a loss and at least one of the causes is not excluded under the terms of the policy. For example, wind and rain from a hurricane both cause loss to an insured's home. If wind is not an excluded cause under the policy (which it almost never is) and loss caused by flooding is excluded, pursuant to the concurrent cause test, the loss will be covered.

New Jersey courts have applied a version of the concurrent causation test. In *Simonetti v. Selective Insurance Co.* 372 N.J. Super. 421 (2004), homeowners brought an action against their insurer to recover for mold damage that a rainstorm allegedly caused. The all-risk homeowner's policy at issue covered "'direct…physical loss to property.'" *Id.* at 422. The policy covered losses caused by a rainstorm, but excluded coverage for losses caused by mold and by faulty design, workmanship and maintenance. *Id.* at 426. The insurer contended that faulty workmanship caused the loss rather than, or in addition to, the storm itself. *Id.* at 428.

The court reversed the grant of the insurer's motion for summary judgment, holding that a question of fact existed as to whether some or all of the damage, including mold, was caused by the rainstorm. *Id.* at 431. The court held that concurrent causation was not an absolute bar to recovery:

> The fact that two or more identifiable causes—one a covered event and one excluded—may contribute to a single property loss does not necessarily bar coverage.

Id. With respect to concurrent causation, the court held that "[w]here included and excluded causes occur *concurrently,* it is for the factfinder to determine which part of the damage was due to the included cause of loss and for which the insured can recover." *Id.* The court further held that, with respect to sequential causes of loss, "our courts have determined that an insured deserves coverage where the included cause of loss is either the first or last step in the chain of causation which leads to the loss." *Id.; see also Franklin Packaging Co. v. Cal. Union Ins. Co.,* 171 N.J. Super. 188, 191-92 (1979) (vandals broke into warehouse and caused flood that damaged inventory; vandalism, a covered cause of loss, was proximate cause even though policy excluded water damage); *Puhlovsky,* 2012 N.J. Super. Unpub. LEXIS at *24 (The "'regardless of any other cause or event' language does not modify or pertain to these exclusions. Accordingly, if the 'efficient or predominant cause' of plaintiff's loss is a covered peril, then the fact that an excluded peril may have also contributed to the loss, does not vitiate coverage.").

Texas applies a variation of the concurrent cause rule that places an evidentiary burden on the insured to come forward with some proof that would provide a reasonable basis for apportioning the loss between a covered cause and an excluded cause. *See Wallis v. United Servs. Auto. Ass'n,* 2 S.W.3d 300, 302–03 (Tex. App. 1999). The evidentiary standard is low and insureds can easily meet it with a reasonable assessment.

C. Anti-Concurrent Causation Language

Substantial debate has arisen over the years about the appropriate causation test. Accordingly, some insurers attempt to address the causation requirement by modifying their policies. A recent commercial property policy contains the following provision:

> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

ISO Properties, Inc, Commercial Property, Causes of Loss – Special Form, Form CP 10 30 06 07 (2007); *see also* Travelers Businessowners Property Coverage Special Form, Form MP T1 02 02 05 (2004) (renewed 2012).

Such terms are often referred to as "anti-concurrent causation language." The Fifth Circuit predicted that at least one jurisdiction would uphold such language to preclude application of the efficient proximate cause doctrine to water damage caused by Hurricane Katrina. *See Leonard,* 499 F.3d at 429-36; *Tuepker,* 507 F.3d at 356; *see also Stewart Enters.,* 614 F.3d at 125-27 (anti-concurrent causation clause did not bar insured's recovery for damage caused by combination of flood and wind); *cf. Corban v. United Servs. Auto. Ass'n,* 20 So. 3d 601, 616-18 (Miss. 2009) (anti-concurrent cause provision not applicable because wind and flood damage did not "contemporaneously converge, operating in conjunction, to cause damage resulting in loss to the insured property," but rather insured property was "separately damaged" by a covered and excluded peril).

Other jurisdictions have found that statutory and public policy limitations precluded anti-concurrent causation language at least in some circumstances. *See, e.g., De Bruyn v. Superior Court,* 158 Cal. App. 4th 1213, 1223 (2008) ("[A]n insurer may limit coverage to some, but not all, manifestations of a given peril, as long as '[a] reasonable insured would readily understand from the policy language which perils are covered and which are not.'" (quoting *Julian v. Hartford Underwriters Ins. Co.,* 35 Cal. 4th 747, 759 (2005))); *cf. Landry v. La. Citizens Prop. Ins. Co.,* 964 So. 2d 463, 484 (La. Ct. App. 2007) (under La. Rev. Stat. § 22:695, if the efficient proximate cause of the insured's damage from Hurricane Rita was wind, rain, or hail (all covered perils), insurer is liable for full face value of the insured property without offset for damage caused by uncovered peril of flood even though the policy contains anti-concurrent causation language), *aff'd in part and vacated in part on other grounds,* 983 So. 2d 66 (La. 2008). *But see Petrick v. State Farm Fire & Cas. Co.,* 2010 N.J. Super. Unpub. LEXIS 1964, at *16-17 (2010) (anti-sequential clause does not violate New Jersey public policy); *Alamia v. Nationwide Mut. Fire Ins. Co,* 495 F. Supp. 2d 362 (S.D.N.Y. 2007).

Under certain circumstances, courts have found anti-concurrent causation language ambiguous and have construed the language in favor of coverage for the insured. *See, e.g., Brooklyn Bridge, Inc. v. S.C. Ins. Co.,* 309 S.C. 141, 143-45 (1992) (anti-concurrent language in an insurance policy, when read in conjunction with a power failure exclusion, was ambiguous as to whether it excluded loss due to spoilage of insured grocery store's inventory after general power failure caused by Hurricane Hugo). Accordingly, insureds should review the wording of their policies carefully to determine whether anti-concurrent language governs, or whether a common law test would apply.

In any event, "[t]he great majority of cases addressing causation disputes under an insurance policy hold that the causal relationship of a loss to a particular alleged instrumentality is a question of fact." 7 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 101:59 (2006). This means, of course, that an insurer should not be able to automatically reject coverage on the notion

COVERAGE FOR LOST BUSINESS

Thousands of businesses suffered disruption of their operations and lost income as a result of Harvey, Irma, Jose, and Maria, and the 2017 Atlantic Hurricane Season has not yet ended. Many property insurance policies also provide "time element" coverage that protects against such losses.

A. Business Interruption

"Business Interruption" coverage typically reimburses the insured for the amount of gross earnings minus normal expenses that the insured would have earned but for the interruption of the insured's business (that is, its profits). *See, e.g., Pennbarr*

Corp. v. Ins. Co. of N. Am., 976 F.2d 145, 154 (3d Cir. 1992) (the purpose of business interruption insurance is "to return to the insured that amount of profit that would have been earned during the period of interruption had a casualty not occurred."); *Howard Stores Corp. v. Foremost Ins. Co.,* 441 N.Y.S.2d 674, 676 (App. Div. 1981) ("The purpose of business interruption insurance is to indemnify the insured against losses arising from inability to continue normal business operation and functions due to the damage sustained as a result of the hazard insured against."), *aff'd,* 439 N.E.2d 397 (N.Y. 1982); *cf. Prudential LMI Commercial Ins. Co. v. Colleton Enters.,* 976 F.2d 727 (4th Cir. 1992) (under South Carolina law, business interruption insurance did not cover expected profits that hotel could have realized if it could have accommodated the influx of temporary workers coming to the area to respond to the hurricane, had the hotel not itself been damaged; insured could not benefit from the insured peril but could only be "put…in the earnings position it would have been in had the insured peril not occurred").

Business interruption coverage provisions typically apply even when an insured is forced to relocate in order to keep its business going or to minimize its overall loss. *See, e.g., Am. Med. Imaging Corp. v. St. Paul Fire & Marine Ins. Co.,* 949 F.2d 690, 692-93 (3d Cir. 1991) (insured reopened at an alternate location, but earned less than it otherwise would have; insurer obligated to indemnify insured while business continued at less-than-normal level).

1. Coverage without Physical Damage

Many businesses have incurred substantial losses as a result of the hurricanes even though they suffered no direct property damage. The effects of the hurricanes will likely be felt across the country, well beyond the areas that suffered a direct hit. While some insurance policies will not respond to such losses, other policies may respond and provide substantial economic recovery. *See, e.g., Cincinnati Ins. Co. v. Washer & Refrigeration Supply Co.,* 2008 U.S. Dist. LEXIS 112464 (S.D. Ala. Aug. 8, 2008) (suspension of operations at a warehouse damaged by Hurricane Katrina could warrant coverage for business losses at distribution and retail outlets that did not sustain damage); *see also RTG Furniture Corp. v. Indus. Risk Insurers,* 616 F. Supp. 2d 1258, 1264-66 (S.D. Fla. 2008) (issues of fact existed as to whether deductible applied to losses caused by Hurricanes Charley, Frances, and Jeanne that were not attributable to physical damage to insured's property); *Fountain Powerboat Indus., Inc. v. Reliance Ins. Co.,* 119 F. Supp. 2d 552, 556-57 (E.D.N.C. 2000) (no physical damage required to trigger business interruption coverage after Hurricane Floyd); *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.,* 787 F.2d 349, 351-52 (8th Cir. 1986) (coverage for business interruption loss of inventory of grocery store granted when store was forced to sell inventory at salvage value due to imminent damage to the store's premises despite the premises not being covered under the policy); *Sloan v. Phoenix of Hartford Ins. Co.,* 46 Mich. App. 46 (1973) (coverage existed because insuring agreements in business interruption policies not only contained words "damage" and "destruction," but also included word "loss," or otherwise encompassed an interpretation that did not require "physical" damage or destruction to property); *Allen Park Theatre Co. v. Mich. Millers Mut. Ins. Co.,* 48 Mich. App. 199, 201 (1973) ("If the insurer wanted to be sure that the payment of business interruption benefits had to be accompanied by physical damage it was its burden to say so unequivocally."); *Pressman v. Aetna Cas. & Sur. Co.,* 574 A.2d 757 (R.I. 1990) (insured could recover for business interruption losses caused by a power outage from a tree falling on a power line); *McMahon Books, Inc. v. Nationwide Prop. & Cas. Ins. Co.,* No. 1992-06-232, 1993 WL 1303168 (Del. Ct. Com. Pl. Jun. 9, 1993) (coverage for business interruption caused by power outage from a fire).

2. Coverage with Damage, but Not to Insured Property

Insurers still may deny time-element coverage even if physical injury to tangible property has incurred, if the physical injury was not covered, or if the property did not belong to the insured. *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.,* 406 N.J. Super. 524, 540 (2009) (electrical grid was "physically damaged" when the grid, its component generators, and transmission lines were incapable of performing the essential function of providing electricity). However, some courts have interpreted business interruption insurance to cover an insured's lost profits caused by physical damage from a windstorm to uncovered property. In *Southeast Mental Health Center, Inc. v. Pacific Insurance Co.* 439 F. Supp. 2d 831 (W.D. Tenn. 2006), a heavy rain and windstorm (referred to by the community as "Hurricane Elvis") destroyed a number of electrical towers, knocking out power and causing extensive data loss from the insured's computer network. As a result, the insured was forced to temporarily suspend its pharmaceutical operations, causing a significant loss of business income. The property damage section of the policy unambiguously excluded coverage for physical damage to property caused by either power failure or computer hardware malfunction. *Id.* at 836, 839. The court concluded, however, that the language in the business interruption section of the policy was ambiguous as to whether it contemplated coverage for the insured's lost profits caused by power failure and computer malfunction and construed that ambiguity in favor of coverage. *Id.* at 839; *see also Wakefern Food,* 406 N.J. Super. At 540.

In a case arising out of Hurricane Katrina, the court found that the insured medical practice could recover the lost income attributable to its hospital practice, even though its services were not provided on the insured premises. *Iteld, Bernstein & Assocs., LLC v. Hanover Ins. Grp.,* 2009 U.S. Dist. LEXIS 71539, at *7-10 (E.D. La. Aug. 12, 2009).

3. *Coverage for Losses Incurred During the Interruption of Operations*

As a result of the hurricanes, many insureds are likely to have suffered an immediate cessation of all business operations followed by a partial resumption of operations on a limited basis before returning to normal operations. Business interruption coverage ordinarily covers losses incurred during the time required to repair, replace, or restore damaged property. Under some policies, coverage may not extend to their full repair period if the insured resumes partial operations before the damaged property is fully repaired. On the other hand, coverage may be extended beyond the repair or replace period to include the additional time that may be required to return to normal operations. *Compare Omaha Paper Stock Co. v. Harbor Ins. Co.,* 596 F.2d 283, 289 (8th Cir. 1979) (finding coverage under "partial suspension of business" provision when a fire partially interrupted insured's processing plant), and *Aztar Corp. v. U.S. Fire Ins. Co.,* 224 P.3d 960, 968 (Ariz. Ct. App. 2010) (noting that "interruption" does not require that a business be unable to function, and that decreased patronage could qualify as business interruption), with *Forestview The Beautiful, Inc. v. All Nation Ins. Co.,* 704 N.W.2d 773 (Minn. Ct. App. 2005) (holding that loss of business income due to a partial suspension of business operations after a hurricane was not covered under a business interruption policy endorsement).

For example, in *Lexington Insurance Co. v. Island Recreational Development Corp.* 706 S.W.2d 754 (Tex. App. 1986), the insured owned a restaurant that was severely damaged in a storm. Upon reopening, it took six months for the restaurant to return to the pre-storm volume of business. The insured sought to recover its losses incurred during the time it was closed and for the losses it incurred in returning to its prior business volume. The court broadly interpreted the policy to protect the reasonable expectations of the insured. Because the policy did not explicitly exclude the period of recovery after resumption of operation, the court held that the insured was entitled to recover for the loss it suffered during its closure and also during the months that followed until its lost business volume was recovered. *Id.* at 755-56.

In *American Medical Imaging Corp. v. St. Paul Fire & Marine Insurance Co.,* 949 F.2d 690, 692-93 (3d Cir. 1991),, fire damage rendered the insured's ultrasound headquarters unusable. The insured's business interruption policy provided coverage for "necessary or potential suspension" of operations. It also required the insured to reduce its loss if possible by "resuming operations." Under the policy, the insurer was obligated to indemnify the insured until it returned to "normal business operations." The insured reopened at an alternate location rather than suffer the extensive losses that a lengthy complete closure of its business would have caused and in compliance with the mitigation requirements of the policy. As a result, the insured incurred extra expenses and earned less than it otherwise would have. The district court concluded that once the insured had reopened for business, recovery for the further period of operation with reduced earnings was precluded.

The Third Circuit rejected this conclusion. *Id.* The appeal court reasoned that the plain language of the policy requiring the insurer to indemnify the insured until it returned to "normal business operations" necessarily implied that the insurer was obligated to indemnify the insured for losses incurred while business continued, albeit at a less-than-normal level, in an effort to minimize its losses. *Id.* at 693. Barring recovery of an insured's loss of earnings and extra expenses resulting from its efforts to minimize its losses would eliminate the insured's motivation to mitigate. *Orrill, Cordell, & Beary, L.L.C. v. CNA Ins. Co.,* 2009 U.S. Dist. LEXIS 20867, at *7 8 (E.D. La. Mar. 16, 2009) (public policy and purpose of insuring business income losses are best served in providing coverage where insured mitigated damages).

B. Contingent Business Interruption

Many businesses have suffered losses because the operations of their suppliers or customers were disrupted by the hurricanes. For example, re-transmitters of the signals of television networks (e.g., cable and satellite dish companies) could not transmit programming to the purchasing consumer due to storm damage to their towers, thus resulting in downward fee adjustments for the networks. Also, following Harvey, insureds across the country that relied on cracked chemicals from their suppliers that operated in Texas may have suffered significant contingent business interruption losses arising from the suppliers' inability to provide their goods at the same level as they did prior to the storm. These lost revenues to the insureds are interruption losses resulting from the property damage sustained by its customers or suppliers.

"Contingent Business Interruption" coverage typically covers two types of business interruption. First, it protects against economic losses caused by a "direct" supplier's inability to get its goods to the insured due to damage to or destruction of the supplier's property by an insured peril. *See Park Electrochemical Corp. v. Cont'l Cas. Co.* 2011 U.S. Dist. LEXIS 16344, *11-12 (E.D.N.Y. Feb. 18, 2011). Second, it protects against economic losses caused by damage to or destruction of a customer's property that prevents the customer from accepting the insured's products. *See Children's Place Retail Stores, Inc. v. Fed. Ins. Co.,* 829 N.Y.S.2d 500 (App. Div. 2007) (business interruption coverage for the period of time reasonably taken to resume operations at a different location following the 9/11 attacks).

In *Archer-Daniels-Midland Co. v. Phoenix Assurance Co. of New York,* for example, as a result of a flood, the insured suffered approximately $55 million in losses consisting of increased costs of transportation and raw materials, even though the insured did not own the damaged property. 936 F. Supp. 534 (S.D. Ill. 1996), *aff'd sub nom. Archer-Daniels-Midland Co. v. Aon Risk Servs., Inc. of Minn.,* 356 F.3d 850, 854-57 (8th Cir. 2004). The policy included a coverage grant for loss sustained by the insured as a result of direct physical damage caused by the perils insured against. *Id.* at 537. The insurers denied coverage because the damaged property was owned by suppliers. *Id.* The insured argued that the policy language required only: (1) that there be direct physical damage to "property," and (2) that the damage be caused by a covered peril. The court found that both of those conditions were met and held that the language of the insuring agreement did not require the damaged property to be insured under the policy. Therefore, the insured was entitled to coverage for its incurred losses. *Id.* at 540.

C. Civil Authority

Many businesses shut down before the storm made landfall because they were located in areas subject to evacuation orders. Others may be located in areas to which access has been denied by similar orders after the storm. "Civil Authority" coverage may provide coverage for such insureds who sustained business losses in the wake of the hurricanes This coverage frequently applies when an insured loses business income because access to its premises is prohibited by an act of the government. In preparation for Irma, many areas were subject to mandatory evacuation orders from state and local governments. Following the devastation, access to many areas remained restricted because of the dangers posed by high waters and damage to trees, structures, and lost utilities. The availability of Civil Authority coverage will depend upon the particular language used in the policy at issue, as well as the timing of the issuance of the order in relationship to the timing of actual damages.

In *Narricot Industries, Inc. v. Fireman's Fund Insurance Co.,* 2002 U.S. Dist. LEXIS 19074 (E.D. Pa. Sept. 30, 2002), for example, the insured was forced to suspend operations at its plant due to the mayor's declaration of a state of emergency following Hurricane Floyd. The insurer denied the insured's claim, alleging that the losses were not covered because the civil authority orders were preventative in nature. The court rejected this contention and held in favor of the insured. The court found coverage because the state of emergency was issued as a result of the property damage already caused by Hurricane Floyd, including damage to electrical lines, a water treatment plant, and a raw water pump station. *Id.* at *11; *but see S. Tex. Med. Clinics, P.A. v. CNA Fin. Corp.,* U.S. Dist. LEXIS 11460, at *34 (S.D. Tex. Feb. 15, 2008) (no Civil Authority coverage when evacuation order was due to anticipated threat of damage).

In *ABM* 397 F.3d at 171, the district court denied Civil Authority coverage because the insured's business income losses were caused by the destruction of the WTC, not by orders of civil authorities, and that those losses would have been incurred even if civil authorities had not prohibited access to that location. The Second Circuit Court of Appeals disagreed because the loss of income that the insured sought under the Civil Authority provision was from its interruption of business at its 34 non-WTC locations. The court found that the destruction, unaccompanied by civil orders, would not have resulted in the loss of income for which the insured sought reimbursement under the Civil Authority provision. *See id.* The court reversed the district court's denial of Civil Authority coverage and remanded the issue to determine whether the civil orders actually impaired access to the properties that the insured serviced. *See id.*

In *Assurance Co. of America v. BBB Service Co.,* 265 Ga. App. 35 (2003), the insured, an owner of several fast food chain restaurants, was forced to close its stores for two and a half days due to a mandatory evacuation of the community during Hurricane Floyd. The insurer denied the insured's business interruption claim, arguing that the civil authority order prohibiting access to the insured's restaurants was based on the threat of direct physical property damage rather than actual damage caused by the hurricane. *Id.* at 35. The court rejected the insurer's argument and affirmed the lower court's grant of coverage for its lost profits. *Id.* at 37.

The Fifth Circuit has taken a limited view of Civil Authority coverage in at least one case, holding that coverage was not available because the insured could not demonstrate a connection between property damage in the Caribbean and a mayoral order to evacuate New Orleans in advance of Hurricane Gustav. *See Dickie Brennan & Co. v. Lexington Ins. Co.,* 636 F.3d 683 (5th Cir. 2011).

Two cases stemming from the closure of Reagan National Airport during the 9/11 attacks demonstrate that small differences in policy language can lead to very different results. The Federal Aviation Administration ("FAA") ordered Reagan Airport closed after the WTC was attacked, but before the Pentagon was attacked. Ultimately, no property was damaged at the airport. It remained closed until October 4.

Both US Airways and United Air Lines sought business interruption coverage. A Virginia court ruled that US Airways' losses were covered (*US Airways, Inc. v. Commonwealth Ins. Co.,* 65 Va. Cir. 238 (Va. Cir. Ct. 2004)), but the Second Circuit held that United's losses were not. (*United Air Lines, Inc. v. Ins. Co. of Pa.,* 439 F.3d 128 (2d Cir. 2006).) The differing result appears to lie in nuanced policy distinctions.

US Airways' business interruption clause provided coverage to the extent access to insured property was prohibited by order of civil authority "'as a direct result of a peril insured against.'" *US Airways,* 65 Va. Cir. at 240. The Virginia state court concluded that this civil authority clause "does not require actual damage or loss of property to invoke coverage," but only the risk of actual damage. *Id.* at 244. US Airways was entitled to coverage for its business interruption losses because the order to close Reagan Airport was issued due to the risk of an imminent attack, and because US Airways property was located there. *Id.* at 245.

In contrast, United's policy provided coverage if access to insured property was prohibited by order of civil authority as a direct result of "'damage to adjacent premises.'" *United,* 439 F.3d at 129. The district court held that the Pentagon is not "adjacent" to Reagan Airport, reasoning that the two facilities are three miles apart and separated by roads and buildings. *Id.* at 134. Moreover, the Second Circuit held that even if the Pentagon were "adjacent" to the airport, United still would have had no coverage because the FAA closure order was issued before the Pentagon suffered actual damage. *Id.* at 134-35.

New York courts have strictly construed the requirement that access to the premises be prohibited, finding that Civil Authority coverage only applies when all access to the insured's property is prohibited. One court found no coverage when limited access to an insured's premises existed even though such access was restricted to levels below normal because of the acts of civil authority. *See 54th St. Ltd. Partners, L.P. v. Fid. & Guar. Ins. Co.,* 763 N.Y.S.2d 243 (App. Div. 2003). Similarly, following the attacks of 9/11, one New York court found that Civil Authority coverage only applied to the period of time when access to all of lower Manhattan was restricted, and did not apply to the time period when police presence and roadblocks may have caused confusion about the ability to access the insured's premises. *See Abner, Herrman & Brock, Inc. v. Great N. Ins. Co.,* 308 F. Supp. 2d 331 (S.D.N.Y. 2004). A slowdown in business may not trigger the coverage because a policy only responds when "a civil authority prohibits access to the insured's premises resulting in a total loss of business income." *N.Y. Career Inst. v. Hanover Ins. Co.,* 791 N.Y.S.2d 338, 342 (Sup. Ct. 2005).

Civil Authority coverage usually is limited to a specified period of time, which often is as short as two weeks or 30 days. *Audubon Internal Med. Grp., Inc. v. Zurich Am. Ins. Co.,* 2008 U.S. Dist. LEXIS 52583 (E.D. La. July 10, 2008) (21-day civil authority coverage did not run concurrently, but rather was in addition to 30-day coverage for business income from dependent properties).

D. Ingress or Egress

Similar to Civil Authority coverage, Ingress or Egress coverage may be available when access to ("ingress") or from ("egress") an insured's premises has been prevented or made more difficult because of a storm. Unlike Civil Authority coverage, no governmental act is required to trigger this coverage. Many policies cover losses when "ingress" to or "egress" from insured premises is "prevented" because of a covered peril. In the aftermath of Harvey and Irma (with the devastation from Jose and Maria yet to be fully determined), many businesses were unable to operate because millions of employees could not get to work and many service businesses could not reach their customers. Many roads were flooded or otherwise blocked.

The availability of Ingress/Egress coverage varies greatly from policy to policy. Frequently, a policy will cover the loss sustained by an insured "'due to the necessary interruption of the Insured's business due to prevention of ingress to or egress from the Insured's property, whether or not the premises or property of the Insured shall have been damaged'" if the interruption resulted from damage of a type insured against by the policy. *See City of Chicago v. Factory Mut. Ins. Co.,* U.S. Dist. LEXIS 4266, at *6 (N.D. Ill. Mar. 18, 2004) (citation omitted).

Other policies may provide Ingress and Egress coverage by protecting against an interruption of business "as a consequence or denial, prevention of, or reduction in access to or use of highways, bridges, causeways…or terminals…or the means of access thereto" caused by an insured peril. Some Ingress and Egress coverage will require that damage be in close proximity to an insured location, or a location that is otherwise covered by the policy and may not be the insured's property. A policy may cover an interruption when "as a result of loss, damage or an event not excluded…at an insured location or within two (2) miles of it, ingress to or egress from real or personal property is prevented." Policies may also provide coverage for an interruption during the time period that "access to or egress from real or personal property is impaired" but only for "ingress/egress impairments…located within one (1) mile of the Insured's premises." Yet other policy language may cover loss arising from "an interruption of business, whether total or partial, during the period of time when, in connection with or following a peril insured against, ingress to or egress from real or personal property is prohibited."

In *Datatab, Inc. v. St. Paul Fire & Marine Insurance Co.,* 347 F. Supp. 36 (S.D.N.Y. 1972), a water main break forced the shutdown of an air conditioning system, which in turn forced a shutdown of an insured's computers and data processing equipment. The insured had coverage protecting against loss where "'the premises in which the property is located is so damaged as to prevent access to such property.'" *Id.* at 37. The court held that the term "premises" was more reasonably considered to mean the entire building, not merely the floors on which the insured conducted its business operations. *Id.* at 37-38. The court also held that the term "access" means more than simply allowing a person to physically enter a room. Instead, it contemplates the use of equipment normally used for the business. *Id.*

> Obviously, what was relevant and important to [the insured] when it bought the St. Paul policy was the ability to utilize the computers in its business on a normal basis. [The insured] could not have been less interested in whether, following a peril insured against, it had the ability to physically touch a non-functioning mass of metal."

Id. at 38. This broad interpretation of policy terms may promote extensive recovery by businesses following the recent storms.

Fountain Powerboat Industries, Inc. v. Reliance Insurance Co., 119 F. Supp. 2d 552 (E.D.N.C. 2000), is an example of coverage for storm-related interference with ingress and egress. In *Fountain,* a hurricane flooded several roads leading to the insured's premises, one of which was closed for several days. However, the insured was able to transport its employees to and from the facility with large trucks. When production at the facility decreased, the insured sought coverage under the ingress/egress clause that ensured "loss sustained during the period of time when, as a direct result of a peril not excluded, ingress to or egress from real and personal property not excluded hereunder, is thereby prevented." *Id.* at 556. The flooding of the roads hindered travel to and from the facility notwithstanding that ingress to and egress from the insured's facility was still possible. The court held that coverage existed because usual routes to and from the facility were obstructed and transportation to and from the facility was more difficult. *Id.* at 557.

E. Service Interruption

The disruption of utility service, such as water and electric services, is an important cause of business losses following a hurricane. As these recent storms have demonstrated, individuals and companies often are without utility service for days or even weeks after a storm has passed. Most businesses simply cannot operate without service from power and water utilities.

Several commercial property insurance policies exclude damage to the insured's property resulting from the utility service interruption that originates away from the insured's premises. *See, e.g.,* ISO Causes Of Loss – Special Form CP 10 30 06 07 § B(1)(e). Under this provision, unless an insured suffers a water or power loss because of equipment failure on its own premises, insurers likely will seek to disclaim coverage for a company's inability to operate because it did not have necessary power or water.

An insured must be careful to review its policy as a whole to determine whether utility service, or any other coverage, may provide recovery for losses caused by hurricanes. Complex issues may stem from the lack of electricity in large parts of the tri-state area. For example, gas stations cannot pump gas without electricity. If people cannot get gas, goods and services do not get delivered and employees cannot get to work. The lack of power may also implicate other time element coverages addressed here, such as contingent business interruption and ingress/egress.

Specific language applying to utility service interruption will trump any standard boiler-plate form exclusion. For instance, in *Rocon Manufacturing, Inc. v. Ferraro,* 605 N.Y.S.2d 591 (App. Div. 1993), the court addressed whether there was coverage for the interruption to a insured's business caused by ice storm damage to a power line not located on the insured's premises. The insured's business was suspended for six days because of the lack of power. The policy contained an exclusion for "'[l]oss caused by or resulting from the lack of power, light, steam or refrigeration.'" *Id.* at 593. The policy also contained coverage for loss resulting from damage to electrical equipment "'whether or not the equipment is located on [the insured's] premises, which is owned by a public utility company contracted by you to supply electric power solely to your premises.'" *Id.* at 592. The court held that the only reasonable interpretation of this language was that the policy covered "lost income resulting from a power failure" to the insured's facility "caused by an accident to the utility company's power equipment," and that this specific grant of coverage superseded the general boiler-plate exclusion for power failure. *Id.* at 592-93.

Many policies cover interruption caused by the failure of a utility service under endorsements that remove the form exclusion for utility service interruption. However, this coverage may be subject to separate and lower limits of insurance than normal business interruption coverage. This endorsement frequently insures losses that the insured incurs due to the interruption of utility services that result from physical damage to the property owned by the utility.

One such endorsement states that it provides coverage for business interruption and extra expense loss if that loss "result[s] from direct physical loss or damage by a Covered Cause of Loss to the following property, located outside of a building described in the Declarations, supplying the following services." The endorsement then describes water, communications, and power supply services, and includes pumping stations, water mains, microwave radio relays, utility generating plants, and transformers among a number of types of property that, if damaged, could result in an interruption of the insured's business. Notably, the endorsement excludes damage to overhead transmission lines, which will limit the available utility service coverage.

F. Extra Expense

"Extra Expense" coverage indemnifies the insured for reasonable and necessary extra or increased costs of business operations above the norm because of a peril insured against. *ABM,* 397 F.3d at 170 (extra expense coverage relating to employee displacement incurred by contractor that serviced buildings destroyed during the 9/11 attacks). It may include coverage for, among other things, costs incurred for the insured to temporarily continue business operations "as normal as practicable," such as the temporary use of the property or facilities of others. For example, in *American Medical Imaging Corp. v. St. Paul Fire & Marine Insurance Co.,* 949 F.2d 690 (3d Cir. 1991), a fire forced the insured to relocate its business headquarters for six weeks. The insured recovered the costs associated with relocating its business to a temporary building under the policy's extra expense coverage. *Id.* at 692, 695; *see also Kiln Underwriting Ltd. v. Jesuit High Sch. of New Orleans,* 2008 U.S. Dist. LEXIS 86286, at *8-10 (E.D. La. Oct. 24, 2008) (policy covered extra expense incurred by school to rent space at alternative location following Hurricane Katrina). Operating expenses incurred for temporary arrangements need not be greater than normal costs in order to be recoverable. *See Dillard Univ. v. Lexington Ins. Co.,* 2009 U.S. Dist. LEXIS 46785, at *11-12 (E.D. La. June 3, 2009).

In the context of hurricanes, one example of expenses covered by the Extra Expense coverage is the purchase of a generator to continue to operate because of an interruption of power.

THE NUMBER OF OCCURRENCES, DEDUCTIBLES, AND LABELS

Another question that may arise involves the number of occurrences. The answer may determine how much coverage is available to an insured loss. This also typically impacts the number of applicable deductibles, if any.

Many insurance policies contain deductibles or self-insured retentions and state that the deductible or retention must be satisfied "per occurrence," "per event," "per loss," or "per claim." *See, e.g., SEACOR Holdings, Inc. v. Commonwealth Ins. Co.,* 635 F.3d 675, 682 (5th Cir. 2011) (insured "experienced different casualties from Katrina's two perils, wind and rain, but under the policy, those losses arose out of one event—Katrina—and warrant only one deductible"); *see also Pinnacle Entm't, Inc. v. Allianz Global Risks US Ins. Co.,* No. 2:06-CV-2008 U.S. Dist. LEXIS 108583, at *14-22 (D. Nev. Mar. 26, 2008) (holding that flood damage associated with Named Storm is covered as separate and distinct peril from "flood" as defined in policy, and rejecting insurer's argument that a peril similar to Named Windstorm was defined solely for deductible purposes because "it is surrounded by definitions of other Perils, including Flood, Earth Movement, and Explosion").

Many policies also contain coverage limits stating the maximum amount that the insurer must pay "per occurrence, event, loss, or claim." And some policies have specific definitions of "occurrences" when weather conditions are involved. *ARM Props. Mgmt. Grp. v. RSUI Indem. Co.,* 2008 U.S. Dist. LEXIS 108619, at *9-11 (W.D. Tex. Nov. 24, 2008) (Hurricane Katrina was a single occurrence which damaged nine properties where policy defined "'occurrence'" as "'any one loss, disaster, casualty, or series of losses, disasters, or casualties arising from one event'" and provided in the case of a hurricane "'one event shall be construed to be all losses arising during a continuous period of 72 hours.'" (citations omitted)).

Courts tend to focus on the cause of the loss in assessing the number of occurrences. *See Peco Energy Co. v. Boden,* 64 F.3d 852, 856 (3d Cir. 1995) ("To determine whether bodily injury or property damage is the result of one occurrence or multiple occurrences, the majority of courts have looked to the cause or causes of the bodily injury or property damage… ." (citation and internal quotation marks omitted)). Courts have reached varying decisions in answering the "how many" question.

Some courts found that based on the circumstances and policy language at issue, only one occurrence had taken place. *See, e.g., World Trade Ctr. Props., L.L.C. v. Hartford Fire Ins. Co.,* 345 F.3d 154, 180 (2d Cir. 2003) ("[N]o finder of fact could reasonably fail to find that the intentional crashes into the WTC of two hijacked airplanes sixteen minutes apart as a result of a single, coordinated plan of attack was, at the least, a 'series of similar causes [as defined by the policy].' Accordingly, we agree… that…the events of September 11th constitute a single occurrence as a matter of law."), overruled on other grounds by *Wachovia Bank, N.A. v. Schmidt,* 546 U.S. 303, 309-10 (2006); *see also Peco,* 64 F.3d at 856 ("[W]hen a scheme to steal property is the proximate and continuing cause of a series or combination of thefts, the losses for liability insurance purposes constitute part of a single occurrence.").

Furthermore, courts frequently find in "disaster" situations that a single occurrence has taken place. One author observed:

> As a general rule, when many persons are injured or damaged as the result of an ongoing physical process, the resulting injuries typically will be treated as one "occurrence." Thus, in cases involving natural disasters, such as fires, floods, or multivehicle auto accidents, courts have generally found only one "occurrence."

Michael F. Aylward, *"Multiple 'Occurrences'—A Divisive Issue,"* Coverage, Jan./Feb. 1995 at 39, 40; *see also id.* at 44 ("Diverse tort claims may be aggregated where they result from the same physical cause, as in the case of a fire or train crash.").

A New York court reached a different conclusion. In *Arthur A. Johnson Corp. v. Indemnity Insurance Co. of North America,* 7 N.Y.2d 222 (1959), the court addressed a circumstance where a major rainfall flooded a construction site, giving rise to multiple damage claims that occurred at separate times. The insurer asserted a $50,000 policy limit per accident and, notwithstanding the fact that two separate walls collapsed, claimed that only one "accident" had taken place resulting from one proximate cause (the rainfall). The court noted that other courts had reached varying conclusions in similar circumstances:

> [T]he catastrophe was not the rain that, in itself, did no harm. It was the breach of the wall letting the rain water in. Furthermore, if the walls were located blocks away from each other on different job sites but subject to the same rainfall, no one could contest that there were two accidents. For these reasons, we conclude that the collapses of separate walls, of separate buildings at separate times, were in fact separate disastrous events and, thus, two different accidents within the meaning of the policy.

Id. at 708.

However, the court also made the following comment:

> In the instant case, it cannot be said that one would allege but one act of negligence as the proximate cause of the injuries to the two separate properties. Here the proximate cause cannot be said to be the heavy rainfall but separate negligent acts of preparing and constructing separate walls which, for all we know, may have been built at separate times by separate groups of workmen.

Id. The court found that the proximate cause was separate negligent acts of preparing and constructing separate walls. If there is a common theme, it may be that the courts generally apply the number of occurrences that maximizes coverage for the insured. This result is consistent with the widely accepted principle that ambiguous policy language will be interpreted in the manner that maximizes coverage.

A court may rule that one occurrence took place for purposes of determining the number of deductibles or retentions, but multiple occurrences took place for purposes of policy limits applicable on a "per occurrence" basis. *See Owens-Illinois, Inc. v. Aetna Cas. & Sur. Co.,* 597 F. Supp. 1515, 1528 (D.D.C. 1984) ("[T]he allocation of rights and obligations established by the insurance policies would be undermined if [the insured's] coverage is subject to multiple deductibles."); *see also* Aylward, *supra*, at 40 ("In seeking to 'maximize' coverage, courts first look to the type of claims presented. Does the insured face hundreds of small claims that will be absorbed by policy deductibles and self- retentions? If so, they are far more likely to treat the claims as involving one 'occurrence.' By contrast, courts are more likely to find multiple 'occurrences' where the limits of liability are relatively low compared to the insured's total exposure." (citations omitted)).

MAKING A COVERAGE CLAIM

Insurance policies typically impose on an insured obligations that must be satisfied to collect insurance. In seeking coverage, many businesses may overlook, or not be aware of, their duties. To preserve coverage, insureds should recognize and perform these duties. While an insurer may waive its right to insist on performance, insureds should proactively seek to comply with coverage obligations.

A. The Duty to Provide Notice

Most insurance policies require that an insured notify the insurer "as soon as possible" or "as soon as practicable" after a loss or other insured event. This notice should be in writing for purposes of creating a record, although early oral notice may suffice, followed by written confirmation. An insured frequently must identify itself and provide information about the time, place, and circumstances of the loss. This notice requirement is intended to give an insurer a chance to investigate a loss or claim while the evidence is still fresh.

Courts frequently construe notice provisions to require that an insured provide notice within a reasonable time after an insured event occurs. *Gilliard v. Progressive,* 945 N.Y.S.2d 739, 740 (App. Div. 2012) (when "'an insured is required to provide notice of a claim as soon as practicable, such notice must be given within a reasonable time under all of the circumstances.'" (citation omitted)); *Arrowood Indem. Co. v. King,* 39 304 Conn. 179, 198 (2012); *Peck v. Pub. Serv. Mut. Ins. Co.,* 326 F.3d 330, 338 (2d Cir. 2003) (whether untimely notice is prejudicial requires a factual inquiry into all of the circumstances); *CSR Ltd. v. Cigna Corp.,* 2006 U.S. Dist. LEXIS 8149, at *49-50 (D.N.J. Feb. 22, 2006) (New Jersey courts interpret "'as soon as practicable'" to mean "'within a reasonable time'") (citing cases). In *Hull v. Hartford Fire Insurance Co.* 100 N.H. 387 (1956), the insured's vacation home was damaged by a windstorm, which the insured did not discover until three years after the storm, when the insured returned to the property. The insured's policy had a 30-day notice provision, but also expressly permitted the insured to vacate the premises. *Id.* at 390. The court, instead of strictly applying the 30-day notice requirement to deny coverage, remanded the case to the lower court to determine whether the insured exercised reasonable care in discovering the damage in a reasonable amount of time in light of the surrounding circumstances. *Id.* at 391; *see also Provident Life & Accident Ins. Co. v. Bertman,* 151 F.2d 1001, 1005-06 (6th Cir. 1945).

The insurer may be excused from its obligations if the insured fails to exercise reasonable care in notifying the insurer of a claim within a reasonable time frame. However, many legitimate reasons may exist that justify not providing notice immediately after a loss, including the lack of power and telephone services, the lack of insurance information (because, for example, the information was destroyed or was kept in safe deposit boxes at banks that were closed) and the need to concentrate on efforts to protect life or property. Nonetheless, insureds should take immediate steps to provide notice. Notice to a broker alone may not be sufficient if the broker fails to give notice to the proper insurers. As a practical tip, the insured should be copied on all communications with the insurer—at least privately, to create a record in the event the broker does not properly give notice.

New York enacted the "no-prejudice" rule for policies issued after January 17, 2009. *See* N.Y. Ins. Law § 3420. With respect to policies issued before that date, an insurer may disclaim coverage without regard to prejudice when the insured fails to satisfy the notice condition. With respect to policies issued after that date, an insurer may not deny coverage based upon late notice unless the insurer can demonstrate that it has been prejudiced. Similarly, "'Connecticut requires two conditions to be satisfied before an insurer's duties can be discharged pursuant to the "notice" provision of a policy: (1) an unexcused, unreasonable delay in notification by the insured; and (2) resulting material prejudice to the insurer." *Arrowood,* 39 A.3d at 198. "[T]he insurer bears the burden of proving, by a preponderance of evidence, that it has been prejudiced by the insured's failure to comply with a notice provision." *Id.* at 201; *see also Gazis v. Miller,* 186 N.J. 224, 229-32 (N.J. 2006) (an insurer must show prejudice from an insured's failure to provide notice "as soon as practicable") (citing cases); *Oriole Gardens Condos., III v. Independence Cas. & Sur. Co.,* 2012 U.S. Dist. LEXIS 29100, at *23-28 (S.D. Fla. Mar. 6, 2012) (discussing purpose of notice provision and finding that the initial claim was made within a reasonable time of Hurricane Wilma, and the notice provision in the policy was ambiguous because it did not specify whether it also pertained to any supplemental claim).

B. The Duty to Cooperate

The duties outlined above may be set out specifically in an insurance policy. Moreover, almost all policies also contain a more general "cooperation" provision obligating the insured to cooperate with the insurer in its investigation of a loss and otherwise. This duty of cooperation obligates the insured to provide access to relevant books and records, provide the insurers with an opportunity to interview witnesses and employees, not commit fraud or perjury, not release claims against other parties to which the insurer may have a right of subrogation, not enter into unauthorized settlements with other parties, and assist the insurer in procuring evidence and securing the attendance of witnesses at depositions, hearings, and trial.

An insured's breach of its duty to cooperate could relieve an insurer of its policy obligations. However, most courts require that the insurer prove that it has been prejudiced by the breach. *See, e.g., Copelin v. State Farm Ins.,* 2009 U.S. Dist. LEXIS 10800 (E.D. La. Feb. 12, 2009) (insurer not entitled to summary judgment where insured homeowners presented evidence that they cooperated with insurer after making claim under policy for damages caused by Hurricane Katrina by submitting requested documentation despite destruction of records during hurricane); *Chem. Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.,* 817 F. Supp. 1136, 1160 (D.N.J. 1993) ("New Jersey law provides that an insurance carrier may disclaim coverage pursuant to a cooperation clause only if it proves (1) that the insured breached the cooperation clause and (2) that the carrier suffered a likelihood of appreciable prejudice as a result of this breach."); *Twin City Fire Ins. Co. v. King Cnty., Wash.,* 749 F. Supp. 230, 233 (W.D. Wash. 1990) (insurer must show both breach of duty to cooperate by the insured and prejudice to be relieved of its duties); *Billington v. Interins.* Exch. of S. Cal., 71 Cal. 2d 728, 737-38 (1969) ("[A]n insurer, in order to establish it was prejudiced by the failure of the insured to cooperate in his defense, must establish at the very least that if the cooperation clause had not been breached there was a substantial likelihood the trier of fact would have found in the insured's favor."); *N.Y. Cent. Mut. Fire Ins. Co. v. Rafailov,* 840 N.Y.S.2d 358, 360 (App. Div. 2007) ("In order to establish breach of a cooperation clause, the insurer must show that the insured 'engaged in an unreasonable and willful pattern of refusing to answer material and relevant questions or to supply material and relevant documents'" (citations omitted)).

An insured should make a good faith effort to comply with its duty to cooperate and should honor reasonable requests from its insurer (requests for privileged information may not be reasonable) to facilitate reimbursement for its losses and not rely on the fact that it may be difficult for the insurer to prove that it has been prejudiced by the insured's non-compliance. Most provisions requiring the cooperation of the insured also provide that the insurer will pay for all additional costs the insured incurs complying with the insurer's requests.

C. Proofs of Loss

Most first-party insurance policies require that an insured provide a "proof of loss, signed and sworn to by the insured," including statements of the time and origin of the loss; the interest of the insured and others in the property; the actual cash value of the property damaged; all encumbrances on the property; all other contracts of insurance potentially covering any of the property; all changes in the title, use, occupation, location, and possession of the property since the policy was issued; by whom and for what purpose any buildings were occupied at the time of the loss; and plans and specifications for all buildings, fixtures, and machinery destroyed or damaged. *See Versai Mgmt. Corp. v. Clarendon Am. Ins. Co.,* 597 F.3d 729, 735-36 (5th Cir. 2010) (when insured complied with policy in submitting proofs of loss, insurer could not require additional documentation when policy created no obligation to do so).

Proofs of loss usually must be submitted within a relatively short time—often within 60 days after the loss incepts or within 60 days after the insurer requests a proof of loss. *See, e.g., Maleh v. N.Y. Prop. Ins. Underwriting Ass'n,* 64 N.Y.2d 613, 614 (1984); *Saba Rug, Inc. v. Great Am. Ins. Cos.,* 678 N.Y.S.2d 629, 629 (App. Div. 1998); *Litter v. Allstate Ins. Co.,* 617 N.Y.S.2d 205, 205 (App. Div. 1994). However, if an insured does not fully comply, it still may be entitled to coverage if it substantially complied with the requirement. *See, e.g., Schultz v. Queen Ins. Co.,* 399 S.W.2d 230, 234 (Mo. Ct. App. 1965) (insured did not forfeit its right to recover for property damage caused by windstorm when provided insurer substantial evidence of damage but never filed formal proof of loss); B*rookins v. State Farm Fire & Cas. Co.,* 529 F. Supp. 386, 390 (S.D. Ga. 1982). A 2012 decision applied the "notice-prejudice" rule to proof of loss in a first-party coverage case. *Henderson v. Farmers Group, Inc.,* 210 Cal. App. 4th 459, 471-79 (2012) ("There is ample reason to apply the 'notice-prejudice' rule here. California has a strong public policy against technical forfeitures. Since forfeitures are not favored, conditions in a contract will if possible be construed to avoid forfeiture. This is particularly true of insurance contracts…. In order to enforce a defense based upon [the insured's] failure to provide a timely proof of loss, [the insurer] must show that it suffered substantial prejudice as a result.") (citations omitted). Nonetheless, an insured should ask for a written extension of time to submit its proof of loss if the claim is complicated to develop. Most insurance companies will cooperate with such a request.

D. Examinations under Oath

Most first-party insurance policies give the insurer the right to conduct, by any person it names (including outside counsel), an examination under oath "as often as may be reasonably required" about any matter relating to the insurance or the loss and require that the insured produce relevant books and records for examination. An insured's failure to submit to an examination under oath may be enough to excuse an insurer from performing its duties under a policy. *See Gould Investors, L.P. v. Gen. Ins. Co. of Trieste & Venice,* 737 F. Supp. 812, 817 (S.D.N.Y. 1990) ("Failure to comply with a policy provision requiring submission to an examination under oath is a material breach of that policy, precluding recovery under it."); *see also Bergen v. Standard Fire Ins. Co.,* 1997 Conn. Super. LEXIS 3494, at *9-10 (1997).

The circumstances giving rise to the failure to submit an examination must be reviewed and an insurer must exercise its rights to an examination in a reasonable manner. *See Delaine v. Finger Lakes Fire & Cas. Co.,* 806 N.Y.S.2d 320, 322 (App. Div. 2005) ("The refusal of plaintiff to answer certain questions at his examination under oath does not constitute a 'willful and avowed obstruction' or a 'substantial and material' breach of his obligation to cooperate, particularly where plaintiff ultimately provided the information sought by defendant at that examination." (citation omitted)); *In re Cypress Tex. Lloyds,* 2011 Tex. App. LEXIS 6598, at *40-42 (Tex. App. Aug. 15, 2011) (insurer could not take insured's examination under oath after claim had been investigated and paid); *see also Goel v. Tower Ins. Co. of N.Y.,* 948 N.Y.S.2d 244, 245 (App. Div. 2012); *Allstate Ins. Co. v. Loester,* 675 N.Y.S.2d 832, 834 (Sup. Ct. 1998).

E. Contractual Limitations Periods

Many property insurance policies contain a contractual limitations period (that is, a contractual statute of limitations). "The purpose behind the shortened limitations period…is to relieve insurance companies of the burden imposed by defending old, stale claims." *Aliberti v. Allstate Ins. Co.,* 74 Cal. App. 4th 138, 145 (1999); *see also Boyce v. Allstate Ins. Co.,* 1994 Conn. Super. LEXIS 29, at *4 (Jan. 5, 1994) ("a shorter statute of limitations would cut down fraudulent claims and avoid problems presented by stale memories and lost or discarded evidence that a longer period of limitations necessarily gives rise to"). Most states recognize that these provisions are enforceable. *See Lawrence v. W. Mut. Ins. Co.,* 204 Cal. App. 3d 565, 571 (1988); *see also 1840 Concourse Assocs., LP v. Praetorian Ins. Co.,* 934 N.Y.S.2d 112 (App. Div. 2011), *leave to appeal denied,* 975 N.E.2d 913 (N.Y. 2012). However, Mississippi long has prohibited contractual clauses purporting to shorten the time otherwise available to bring suit to less than the regular three-year statute of limitations. *See* Miss. Code Ann. §§ 15-1-5, 15-1-49. And, states may enact similar statutes applying to specific named storms if they are particularly devastating. For example, Louisiana enacted a statute that provided insureds until September 1, 2007, to file claims regarding Hurricane Katrina and until October 1, 2007, to file claims regarding Hurricane Rita regardless of any contractual limitations in their policies. *See* La. Rev. Stat. Ann. § 22:658.3. Therefore, insureds must be careful to commence suit in a timely fashion or obtain an agreement with the insurer tolling the running of the limitations period.

The limitations period typically commences running on the "inception of the loss." "Inception of the loss" has been construed as "that point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that his notification duty under the policy has been triggered." *Prudential-LMI Commercial Ins. v. Superior Court,* 51 Cal. 3d 674, 686-87 (1990); *see also Lichter Real Estate No. Three, L.L.C. v. Greater N.Y. Ins. Co.,* 841 N.Y.S.2d 93, 94 (App. Div. 2007). However, the insured is required to be diligent. This means that "[t]he more substantial or unusual the nature of the damage discovered by the insured…, the greater the insured's duty to notify his insurer of the loss promptly and diligently." *Prudential-LMI,* 51 Cal. 3d at 687. Furthermore, the contractual limitations period "begin[s] to run on the date of cognizable damage even if the insured subjectively believes that its policy provides no coverage for the damage." *Sullivan v. Allstate Ins. Co.,* 964 F. Supp. 1407, 1413 (C.D. Cal. 1997).

In many states, the running of the limitations period may be tolled from the date that the insured gives notice until the insurer communicates its coverage position "clearly and unequivocally in writing." *See, e.g., Aliberti,* 74 Cal. App. 4th at 148-49; *see also Peloso v. Hartford Fire Ins. Co.,* 56 N.J. 514, 521 (1970). However, the law may vary from state to state. For example, a Louisiana statute provides that the limitations period is not interrupted or suspended by an insurer's acknowledgement of notice of a loss or claim or by its investigation or negotiations regarding a loss or claim. La. Rev. Stat. Ann. § 22:879.

Courts have recognized that an insurer can waive a limitations period by its conduct. For example, in *Smith v. Metropolitan Property & Casualty Insurance Co.,* 868 So. 2d 57 (La. Ct. App. 2003), the court addressed a suit limitations clause in a homeowners policy. It held that "[a] tacit waiver or interruption of [the suit limitations period] may be found if the insurer (1) continues negotiations, thereby inducing the insured to believe the claim will be settled or not contested, (2) makes an unconditional offer of payment, or (3) performs acts of reparation or indemnity." *Id.* at 59. The court upheld a denial of summary judgment based on the suit limitations clause, finding that "the trial court could have found that a genuine issue of material fact remained on the issue of whether representations by an adjuster, coupled with Metropolitan's continued contacts and consideration of her case over a long period of time, lulled [the insured] into believing that the claims she filed were not going to be contested or would be settled without the need for suit." *Id.* at 59-60; *see also N. Am. Foreign Trading Corp. v. Mitsui Sumitomo Ins. USA, Inc.,* 292 F. App'x 73, 76 (2d Cir. 2008).

Some states have laws that may bar parties from agreeing to extend contractual limitations periods even if parties agree to such an extension. *See, e.g., Max Tobias, Jr., et al., Louisiana Practice Series, Louisiana Civil Pretrial Procedure* § 6:20 (2007) ("The parties cannot by contract exclude or lengthen any period of prescription."). However, such an agreement might support a waiver argument.

It is thus extremely important that insureds take all appropriate steps to ensure that suits, if necessary, are filed in a timely fashion. Unfortunately, insureds may not find clear answers and may have to initiate litigation to preserve their rights given possible disputes over which law controls (e.g., the law of the jurisdiction where the insured is headquartered and the policy was brokered, or the law of the jurisdiction where the loss was suffered).

LOST OR DESTROYED INSURANCE POLICIES

Absent a waiver from the insurer, typically the insured is obligated to prove the existence and terms of its insurance policies. For this reason, insureds should store copies of insurance policies in a secure location somewhere other than at the business premises or home. Otherwise, given the nature of catastrophic damage, such as that caused by a hurricane, some insureds may find themselves unable to locate lost or destroyed policies.

If policies are lost or destroyed, however, insureds may be able to locate or identify policies and their terms. If the secondary sources or non-insurance files are not helpful, the insured should contact the broker or agent who sold the insured the policy. The broker or agent may have records establishing the policy terms and sale. It is not, however, certain that the broker or agent will retain the policy. Bank and accounting records are another potential source of information about insurance. Entries in these documents often show the purchase of insurance and often show the insurer, the policy number, premium, and other relevant information.

In addition, depending upon the type of business engaged in by the insured, the insured also may have given proof of insurance to third parties with whom it did business. For example, a business may have to show insurance in connection with real estate and lease transactions or for transport of its goods or for construction-related activities. These other parties may have needed insurance information.

Finally, an insured should consider the possibility that it may be entitled to coverage under policies issued to other persons or companies. Many contracts require that one party add the other as an "additional insured" under the first party's own insurance policies.

PROVING THE AMOUNT OF THE LOSS

A. Steps to Take

Once insurance policy terms are determined, the insured must prove that the loss it suffered is within the terms of the policy. Insureds that sustain property damage should immediately begin documenting the claim and gathering supporting evidence. An insured may want or need to conduct a forensic investigation long after damaged property is repaired or replaced. It often is advisable to seek the assistance of (i) attorneys to determine the scope of coverage to which the insured is entitled, and (ii) forensic accountants to assist in categorizing and documenting the extent of the loss for presentation to the insurer. Under many policies, these types of "loss adjustment" expenses are covered and sometimes covered "outside the limits" of the policy.

As a general rule, an insured should retain all receipts, estimates, and documents. Immediately after the loss, an insured should (1) develop an inventory of all damaged property; (2) determine what property can be repaired and what cannot be repaired; (3) determine salvage value, if any, of property that cannot be repaired; (4) identify quantities, costs, and values of damaged property, and the amount of loss claimed (replacement cost versus actual cash value or like-kind repair and replacement); and (5) keep a record of all expenses (such as invoices and receipts). The insured also should document the damage and loss by taking photographs and, if possible, videotaping the property.

B. Measuring Business Interruption Losses

Insurance policies typically contain provisions stating how business interruption losses are to be measured. They often address the issue in terms of the "actual loss sustained," which frequently is measured in terms of either (i) the net reduction in gross earnings minus expenses that do not necessarily continue or (ii) net profit that is prevented from being earned plus necessary expenses that continue during the period of interruption.

When policies indicate that the measurement is the difference between actual earnings or profits and, in essence, what otherwise would be expected, insureds frequently measure their loss by comparing the income they would have generated without the weather conditions to the income they actually generated. This measurement may result in a lower insurance recovery than the law permits. An insured should consider measuring its loss not based on what it would have made but for the hurricane, but based on what it would have made had its facilities and operations not been affected by the hurricane. As one court has explained, the policy "does not exclude profit opportunities due to increased consumer demand created by" an insured peril. *Levitz Furniture Corp. v. Houston Cas. Co.,* 1997 U.S. Dist. LEXIS 5883, at *8 (E.D. La. Apr. 28, 1997); *see also Berk-Cohen Assocs., LLC v. Landmark Am. Ins. Co.,* 2009 U.S. Dist. LEXIS 77300, at *17-18 (E.D. La. Aug. 27, 2009) (for purposes of calculating lost business income, insured could use favorable market conditions resulting from flooding, an excluded cause of loss); c*f. Catlin Syndicate Ltd. v. Imperial Palace of Miss., Inc.,* 2008 U.S. Dist. LEXIS 103831, at *14-20 (S.D. Miss. Dec. 15, 2008) (court disagreed that best measure of business interruption loss was what insured casino earned once it reopened after Hurricane Katrina, when other casinos remained closed), *aff'd,* 600 F.3d 511 (5th Cir. 2010). As the *Levitz* court explained, "business interruption loss earnings may include sales [the insured] would have made in the aftermath of the [peril] had it been open for business during that period." 1997 U.S. Dist. LEXIS at *8.

C. The Appraisal Process

Most insurance policies provide for an appraisal to establish the amount of loss to which the insured is entitled if a disagreement arises between the insurer and the insured over the *amount* of liability. Generally, upon either party's written demand, the insured and the insurer each appoint an appraiser. These two appraisers select an impartial umpire. The appraisers then set the amount of the loss. If the appraisers agree on the amount of loss, that amount is established as the amount of loss. If the appraisers fail to agree within a reasonable time, each submits an appraisal to the umpire and a written agreement signed by any two of the three establishes the amount of loss. *See, e.g., St. Charles Parish Hosp. Serv. Dist. No. 1 v. United Fire & Cas. Co.,* 681 F. Supp. 2d 748, 751-52 (E.D. La. 2010) (describing appraisal process used pursuant to insurance policy to value property and business income loss caused by Hurricane Katrina).

Appraisals usually are limited to the amount of a loss, not whether there has been a loss or any coverage issues. *See, e.g., De La Cruz v. Bankers Ins. Co.,* 237 F. Supp. 2d 1370, 1374 (S.D. Fla. 2002) ("The appraisal clause can only be invoked when the parties cannot agree as to the actual cash value, or…the replacement cost of an insured item of property. This language cannot be stretched to mean that appraisal can be invoked whenever the parties dispute which items of property were damaged or whether those items were in fact damaged…. That type of dispute is a dispute over coverage….").

CONCLUSION

Those who have suffered losses because of the 2017 hurricanes may have substantial financial protection through their insurance policies. Insureds should consider their coverage possibilities and act promptly to recover all benefits available under that coverage.

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